

Section 202 – Family and Medical Leave

Section 202 of the Congressional Accountability Act (CAA) applies certain rights and protections of the Family and Medical Leave Act of 1993 (FMLA) to covered employees. These rights and protections entitle “eligible” covered employees to take up to 12 weeks of unpaid leave in a 12 month period for certain family and medical reasons with continued health insurance benefits. Upon returning to work from family and medical leave, employees will generally be restored to the same or equivalent position as the one they occupied prior to taking leave.

Congress has adopted substantive regulations that are essentially the same as the substantive regulations promulgated by the Secretary of Labor under the FMLA. These regulations can be found in the substantive regulations of the Office of Compliance (“Office of Compliance Regulations”). Office of Compliance Regulations, however, contain a definition of “eligible employee” that differs from the definition in the FMLA and the regulations promulgated by the Secretary of Labor.

1. Coverage

To qualify as an “eligible employee” entitled to FMLA benefits under the CAA, a covered employee must have been employed in any employing office covered by the CAA for a total of 12 months of employment and for at least 1,250 hours of employment during the previous 12 months.

The 12 months of employment do not need to have been consecutive, or for a single employing office. If an employee was on the payroll for part of a week, the entire week counts towards the 12 months of employment.

The minimum of 1,250 hours of employment must have been worked during the 12 months immediately preceding the commencement of leave. If the employee worked for more than one employing office during that period, the hours of work will be added together. An employing office must be able to clearly demonstrate that an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not “eligible” for FMLA leave. Employment with covered offices prior to January 23, 1996, is included in determining employee eligibility.

The covered employees and employing offices subject generally to the CAA are described in the “Covered Employees” section of the *CAA Handbook* and the Office of Compliance web site (www.compliance.gov).

2. Family and Medical Leave Entitlement

The Family and Medical Leave provisions of the CAA entitle an “eligible employee” to take a total of 12 weeks of unpaid leave within a 12-month period for specified family and medical reasons. Under certain conditions, either the employee or the employing office may elect to substitute accrued paid sick or vacation leave for the unpaid leave. The employing office must maintain group health coverage for the employee, and under most circumstances the employee must be restored to the same or an equivalent position upon returning from the leave.

3. Reasons for Leave

Eligible employees may take family and medical leave for any of the following reasons:

- ◆ The birth and care of a newborn child of the employee

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- ◆ Placement of a child with the employee for adoption or foster care
- ◆ To care for an immediate family member (spouse, child, or parent) with a “serious health condition”
- ◆ Because of a “serious health condition” that makes the employee unable to perform the functions of his/her position

As described more fully in Office of Compliance Regulations, a “serious health condition” includes an illness, injury, impairment, or condition that involves either:

- ◆ inpatient care (for example, an overnight stay) in a medical care facility, including any period of incapacity or subsequent treatment; or
- ◆ continuing treatment by a health care provider, including periods of incapacity in some instances.

4. Amount and Timing of Leave

a. Calculating the 12-month period

An eligible employee is entitled to a total of 12 workweeks of family and medical leave during a 12-month period. An employing office may use any of the following methods to calculate the 12-month period in which the 12 weeks of leave entitlement occurs:

- ◆ The calendar year
- ◆ Any fixed 12-month period, such as a fiscal year, a “leave year,” or a year starting on the employee’s anniversary date
- ◆ A rolling 12-month period measured backward from the date the employee uses family and medical leave
- ◆ The 12-month period measured forward from the date the employee first takes family and medical leave

Whichever method the employing office chooses must be applied consistently to all employees of the employing office. If the employing office fails to select one of the above options, the option that is most beneficial to the employee will be used.

b. Intermittent and reduced leave schedule

Under some circumstances, employees may take family and medical leave intermittently (in separate blocks of time) or on a reduced leave schedule (reduced weekly or daily work schedule). When leave is for the birth or placement of a child for adoption or foster care, use of leave intermittently or on a reduced leave schedule is subject to the agreement of the employing office. The employing office’s agreement is not required, however, for leave during which the mother has a serious health condition in connection with the birth of a child, or if the newborn child has a serious health condition.

Leave may be taken intermittently or on a reduced leave schedule whenever medically necessary to care for a seriously ill family member, or because the employee is seriously ill and unable to work.

If a covered employee properly requests intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment, the employer may require the employee to temporarily transfer to an alternative position with equivalent pay and benefits that better accommodates recurring periods of leave.

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c. Husband and wife employed by the same employing office

If a husband and wife entitled to family and medical leave are employed by the same employing office, the combined total number of workweeks of leave to which both are entitled may be limited to 12 workweeks during any 12-month period if such leave is taken for the birth or placement of a child or for the care of a sick parent.

d. Expiration of entitlement after birth or placement of a child

When leave is for the birth of a child or the placement of a child for adoption or foster care, the entitlement expires 12 months after the date of the birth or placement.

5. Paid and Unpaid Leave

Under certain circumstances, an eligible employee may choose, or the employing office may require, the substitution of accrued paid vacation, personal, family, or sick leave for some or all of the family and medical leave. The employing office is not required to provide paid sick leave in any situation where the employing office would not normally provide such leave.

In all circumstances it is the employing office's responsibility to designate leave as family and medical leave and to give prompt notice of the designation to the employee, so that the leave (paid or unpaid) will be counted against the employee's 12-week leave entitlement.

Compensatory time off, if allowed pursuant to Office of Compliance Regulations, is not counted against the employee's entitlement for family and medical leave, regardless of the purpose for which the compensatory time off is used by the employee.

6. Maintenance of Health Benefits

While the covered employee is on family and medical leave, the employing office must maintain the same coverage under any group health plan for the duration of the leave, as if the employee had continued in employment. Any share of group health plan premiums that had been paid by the employee prior to taking family and medical leave must continue to be paid by the employee during the leave period, as if the employee were employed continuously during the leave period.

In some instances, the premiums paid by (or on behalf of) the employing office for maintaining group health coverage may be recovered from the employee if the employee fails to return to work.

7. Reinstatement Rights

At the conclusion of family and medical leave, an employee is entitled to be restored to the same position the employee held when leave commenced, or to an equivalent position that involves the same or substantially similar duties and responsibilities, with equivalent benefits, pay, and other terms and conditions of employment.

If the employee is no longer able to perform the essential functions of the position because of a physical or mental condition, the employee has no right to be restored to an alternative position. However, the employing office's obligations may be governed by rights and protections against discrimination on the basis of disability, as made applicable by the CAA.

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At the end of an employee's family and medical leave, benefits must be resumed in the same manner and at the same level as provided when the leave began, subject to any changes in benefit levels that may have occurred during the period of leave affecting the entire workplace. No employment benefit accrued prior to the date on which leave commenced is to be lost by the employee.

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the leave period. For example, if an employing office could prove that an employee would have been laid off during the leave period, the employee would not be entitled to restoration. The employing office may – but is not required to – allow the employee to accrue seniority or employment benefits during family and medical leave.

Under certain limited circumstances where restoration to employment will cause substantial and grievous economic injury to its operations, an employing office may refuse to reinstate certain highly-paid “key” employees after using family and medical leave. In order to do so, the employing office must notify the employee of his/her status as a “key” employee when the employee gives notice of need for FMLA leave, and must satisfy other requirements.

A “key” employee is a salaried eligible employee who is among the highest paid ten percent of employees within 75 miles of the work site.

8. Notifications and Certifications

a. Required notice to eligible employees

Employing offices are required to inform employees of their rights and responsibilities under family and medical leave provisions of the CAA. Written notices, with information as specified in Office of Compliance Regulations, must be provided to each employee no less often than the first time in each 6-month period that an employee gives notice of the need for family and medical leave. In addition, if an employing office provides written guidance to employees concerning employee benefits or leave rights, such as an employee handbook, information concerning both entitlements and employee obligations under section 202 of the CAA must be included in the handbook or other document.

b. Thirty-days advance notice to employing offices for “foreseeable” leave

If the need for family and medical leave is foreseeable, the employee is required to provide the employing office with at least 30 days advance notice. If 30 days notice is not practicable, the employee must give as much notice as is practicable.

An employing office may always waive family and medical leave notice requirements. However, if an employee fails to give 30 days notice for foreseeable leave with no reasonable excuse for the delay, the employing office may delay the taking of family and medical leave.

For the onset of the employee's family and medical leave to be delayed because of lack of required notice, it must be clear that the employee had actual notice of the family and medical leave notice requirements.

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c. Additional certifications and reports

Employing offices may also require that employees to provide additional certifications and report, including:

- ◆ medical certification supporting the need for leave due to a serious health condition affecting the employee or an immediate family member;
- ◆ second or third medical opinions (at the employer's expense) and periodic recertification; and
- ◆ periodic reports during FMLA leave regarding the employee's status and intent to return to work.

9. Joint Employer and Primary Employer

Two or more employing offices may be considered “joint employers” where the employing offices exercise some control over the work or working conditions of an employee (for example, if an employee does work that simultaneously benefits the employing offices), a “joint employment” relationship may exist. Under Office of Compliance Regulations, when employing offices employ a covered employee jointly, they may designate one to be the “primary employer.” The primary employing office is responsible for giving required notices to the covered employee and providing family and medical leave. If such a designation is not made, the employee may elect which of the joint employing offices will be required to perform the responsibilities of a primary employer.

10. Special Rules for Employees of Certain Schools

Special rules apply to employees of local educational agencies and private elementary and secondary schools. Generally, these rules affect the taking of intermittent leave or leave on a reduced leave schedule, or leave near the end of an academic term, by instructional employees.

11. Intimidation or Reprisal

Intimidation, reprisal, or discrimination against a covered employee for opposing practices or for initiating or participating in a proceeding is prohibited.

12. Remedies

An employee who alleges a violation of the rights and remedies of the FMLA must commence a proceeding with the Office of Compliance within 180 day.